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NOTES.

CONTRACTUAL CAPACITY AND THE CONFLICT OF LAWS.—Inherent in every sovereignty is the power of exercising control over persons living under its protection, and consequently, reference is had to its laws primarily in determining their status. Because of the immediate nature of this sovereign control, domicile rather than citizenship has in cases of conflict between jurisdictions, become determinative in this regard.[1] It is natural, moreover, that the same controlling force should be recognized with respect to transactions taking place within the limits of the sovereignty's jurisdiction.[2] It is in this sense that parties to a contract are said to submit themselves to the law of the place of

[1]Wharton, Confl. of L. (3 ed.) §§ 8, 87; Ross *v.* Ross (1880) 129 Mass. 243; Woodward *v.* Woodward (1889) 87 Tenn. 645.

[2]See Coe *v.* Errol (1886) 116 U. S. 517.

contracting.[3] This law, however, has no necessary concern with all the legal results flowing from the contractual act, and where they are projected beyond the jurisdictional influence, the application of a different law is logically warranted.[4] Elements involved in the inception of a contract and affecting therefore its initial validity would not, in accordance with this theory, be so projected, and would therefore continue subject to the law of the place of contract. Of this nature is contractual capacity,[5] typically illustrated by cases involving contracts having a married woman as a party.[6] Although capacity is incident to status, and so subject in some respects to its governing rules,[7] yet when it comes under consideration as affecting the initial validity of a contract, the law of the place of contracting is naturally referred to, in accordance with the reasoning above expressed, rather than the law of the domicile of the parties,[8] and such is the general rule in the United States.[9] The practical basis of the rule, however, is to be sought rather in considerations of expediency, aiming at greater security in commercial transactions by affording to the contracting parties the common basis of the local law.[10] The effect then, of the majority of the cases in following this rule, has been to sustain the validity of a contract by recognizing capacity according to the laws of the place of contracting,[11] although denied by the domicile.[12] Where however the courts of the domicile have faced a direct contravention of what was conceived to be a distinctive local policy of the sovereignty, they have refused recognition to the law of

[3]Scudder *v.* Union Nat. Bank (1875) 91 U. S. 406; Grand *v.* Livingston (N. Y. 1896) 4 App. Div. 589.

[4]Pritchard *v.* Norton (1882) 106 U. S. 124; Scudder *v.* Union Nat. Bank *supra.*

[5]Wharton, Confl. of L. (3 ed.) § 427 h; Campbell *v.* Crampton (1880) 18 Blatch. 150; Hager *v.* Nat. etc. Bank (1898) 105 Ga. 116.

[6]Although the contracts of an infant are according to the common law voidable only, the question of contractual capacity, when arising in a common law State cannot be treated as affecting the initial validity of the contract. Wharton, Confl. of L. (3 ed.) § 427 j. The courts, however, make no such distinction, and apply the law of the place of contract uniformly. Thompson *v.* Ketcham (N. Y. 1811) 8 Johns. 189; Male *v.* Roberts (1800) 3 Esp. 163; but see *In re* Cooke's Trusts (1887) 56 L. J. Ch. 637.

[7]Ross *v.* Ross *supra;* Woodward *v.* Woodward *supra;* Wharton, Confl. of L. (3 ed.) §§ 20, 84.

[8]See cases cited in note 5.

[9]Conn. etc. Ins. Co. *v.* Westervelt (1879) 52 Conn. 586; First Nat. Bank *v.* Mitchell (1899) 92 Fed. 565; Pearl *v.* Hansborough (Tenn. 1848) 9 Humph. 426; Union Nat. Bank *v.* Chapman (1902) 169 N. Y. 538; Milliken *v.* Pratt (1878) 125 Mass. 374; Thompson *v.* Ketcham *supra; cf.* Gates *v.* Bingham (1881) 49 Conn. 275; but see Union Nat. Bank *v.* Hartwell (1887) 84 Ala. 379; Baer Bros. *v.* Terry (1900) 105 La. Ann. 479.

[10]Milliken *v.* Pratt *supra;* Wharton, Confl. of L. (3 ed.) §§ 98, 118 a; Story, Confl. of L. §§ 73, 106. In France, commercial expediency has caused a departure from the national law to that of the place of contract. De Lizardi *v.* Chaize (France 1861) 1862, Journal du Palais 427; X *v.* Y. (France 1893) 20 Clunet 530.

[11]Milliken *v.* Pratt *supra;* Phœnix etc. Ins. Co. *v.* Simons (1892) 52 Mo. App. 357; Wright *v.* Remington (1879) 41 N. J. L. 48.

[12]Bowles *v.* Field (1897) 83 Fed. 886; First Nat. Bank *v.* Mitchell *supra;* Pearl *v.* Hansborough *supra;* Milliken *v.* Pratt *supra.*

the place of contracting,[13] and have applied, as shown by the grounds of decision,[14] the law of the forum rather than the domiciliary law.

In order to apply the general rule in terms, effect must of course be denied to a contract, one of the parties to which had no capacity by the law of the place of contracting, although there was capacity according to the domiciliary law. *Nichols & Shepard Co.* v. *Marshall*[15] sustains this proposition, effect being denied to a contract made and performable in Indiana where the defendant had no capacity but where according to the domiciliary law she had capacity. Is this authoritative where the contract is performable in a place recognizing the party's capacity, or is the general rule too broad, and may the courts, consistently with the conditions establishing it, apply under such circumstances the law of the place of performance? Manifestly the courts have, in enunciating the general rule, shown a desire to prevent the evasion of just obligations for the sake of greater commercial security,[16] and to blindly accept a rule leading to a contrary result, would be inconsistent with its purpose. Where there is incapacity according to the law of the domicile, parties contracting there should clearly be incompetent to create capacity by merely looking to performance elsewhere,[17] yet where there is capacity by the domicile, it is difficult to see why parties contracting while temporarily in a place denying them capacity, should be infected by such incapacity.[18] The potency of the law of the place of contracting with respect to capacity, would in this event be negligible.[19] Since laws governing incapacity

[13]Armstrong etc. Co. *v.* Best (1893) 112 N. C. 59; First Nat. Bank *v.* Shaw (1902) 109 Tenn. 237. Enforcement of a contract has been refused where there was no proper remedy available by the *lex fori.* Bank of La. *v.* Williams (1872) 46 Miss. 618; Hochstadter *v.* Hays (1887) 11 Colo. 118.

[14]See International Harvester Co. *v.* McAdam (1910) 142 Wis. 114. Refusal to apply the foreign law because of local policy results in the application of the *lex fori.* See 10 COLUMBIA LAW REVIEW 63.

[15](1899) 108 Ia. 518. In this case the forum was also the domicile.

[16]See note 10.

[17]See note 18.

[18]Although in sustaining such a contract, incapacity by the domiciliary law is disregarded where there is capacity by the law of the place of contracting, see note 12, the domiciliary law becomes important in this respect where there is no capacity according to the law of the place where the contract sought to be enforced was made. If there is no capacity according to the domiciliary law, the parties would in effect be creating capacity by indicating the place of performance. See note 21. Capacity, however, is not properly dependent upon intention. Wharton, Confl. of L. (3 ed.) § 427 h. If there is capacity by the law of the domicile, however, the indication of a place of performance merely gives effect to existing capacity, which in the place of contracting could have none, because of local policy as expressed in its laws. See note 19.

[19]In spite of the dominant position of the *lex rei sitæ* with respect to real property, this law could not be determinative of contractual capacity with respect thereto, if capacity were in its nature indissociable from the place of contract. That it is so dissociable is the uniform result of the decisions. Post *v.* First Nat. Bank (1891) 138 Ill. 559; Cochran *v.* Benton (1890) 126 Ind. 58; Sell *v.* Miller (1860) 11 Ohio St. 331; Johnston *v.* Gawtry (1882) 11 Mo. App. 322.

are uniformly expressive of a State's policy,[20] and as such purely intraterritorial in scope and effect, it may be argued not only that this policy is not contravened by the enforcement of a contract performable elsewhere, but also that such legislation could not in its nature have been directed against non-residents having performance without the jurisdiction in view.[21] It would seem that in such event, although the contract becomes complete within the jurisdiction, its laws would be operative to no greater degree than where a married woman under a disability affixes her signature to a contract which awaits completion in a state where her capacity is recognized.[22] Where therefore a contract is performable without the jurisdiction of the place of contracting, by the laws of which a party thereto is incapacitated, the courts may properly disregard the force of those laws, it would seem,[23] and apply the law of the place of performance, for the purpose of upholding the contract, provided there be capacity by the domiciliary law,[24] and if the place of performance be the forum, no violation of its policy.[25]

This situation was presented to a New York court in the recent case of *Hammerstein* v. *Sylva* (1910) 124 N. Y. Supp. 535, where the parties made a contract in France performable in New York where they were domiciled. One of the parties although capable by New York law, was (it was assumed for the purposes of the decision) incapable by French law. The court held, that since the validity of a contract was governed by the law of the place of performance, capacity being conceived as included within the validity, and since the defendant was capable both by the law of the domicile and of the place of performance, the defendant was liable. Although exception must be taken to the reasoning of the court prompting the adoption of the law of the place of performance as determinative of contractual capacity, as well as to its enunciation of the vitality of the domiciliary law, the result commends itself as a modification of the American rule, consistent with its purpose.

EFFECT OF DEFECTIVE INCORPORATION ON LIABILITY OF STOCKHOLDERS. —In the recent case of *Jennings* v. *Dark* (Ind. 1910) 92 N. E. 778, the Supreme Court of Indiana considered the status of stockholders of a defectively incorporated association and reached the conclusion that one who had dealt with the company as a corporation could not enforce the general liability of its members as partners. The decision rested in

[20]Milliken *v.* Pratt *supra;* International Harvester Co. *v.* McAdam *supra;* Armstrong etc. Co. *v.* Best *supra;* First Nat. Bank *v.* Shaw *supra;* Gates *v.* Bingham *supra.*

[21]This would not, however, countenance the designation of an extra-territorial place of performance for the mere purpose of evading the effect of local policy. Campbell *v.* Crampton *supra;* Hager *v.* Nat. etc. Bank *supra.*

[22]*Cf.* Voigt *v.* Brown (N. Y. 1886) 42 Hun. 394; Milliken *v.* Pratt *supra;* Phœnix etc. Ins. Co. *v.* Simons *supra.* See also note 19.

[23]See Story, Confl. of L. §§ 73, 102, 106; Voigt *v.* Brown *supra;* Union Nat. Bank *v.* Chapman *supra;* Hauck Clothing Co. *v.* Sharpe (1900) 83 Mo. App. 385.

[24]See note 18.

[25]*Cf.* Nichols & Shepard Co. *v.* Marshall (1899) 108 Ia. 518 and cases in note 21.